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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

JARNIS UNITED PROPERTIES CO.,

Petitioner,

v.

SIGMUND LEFKOVITZ, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner was not named as a party, was not served with any papers, and did not otherwise participate in the underlying arbitration. Yet, the arbitrator's award ordered petitioner to pay over $1.8 million in attorneys' fees incurred by arbitral parties, made petitioner jointly and severally liable for over $2.34 million in awarded damages, and ordered petitioner to pay for the preparation of audited financial statements both for itself and for dozens of other businesses. After rejecting petitioner's request to intervene in the subsequent judicial review proceeding, the district court confirmed the award, and the court of appeals affirmed.

The questions presented are as follows:

1. Whether an arbitrator exceeds his authority by imposing financial obligations on a nonparty to the arbitration.

2. Whether a nonparty against which an arbitrator entered an award has a right to intervene in the district court confirmation proceeding.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Defendants-Appellants and Cross-Appellees: Nathan Wagner; Wagner Associates; Robert U. Goldman; Robert U. Goldman, Ltd.; Jay Felner; Albert Schwartzberg; NCIS Co.; New Century Investor Services, Inc.; and 29-31 Associates.

Plaintiffs-Appellees and Cross-Appellants: Sigmund Lefkovitz; Arlene Lefkovitz; Glenn Paul Lefkovitz; Irving Lefkovitz; June Lefkovitz; Sigmund Lefkovitz Family Trust for the Family of Shelley Ann, u/a/d July 31, 1973, Gayle R. Dougherty, Trustee; Sigmund Lefkovitz Family Trust for the Family of Glenn Paul u/a/d July 31, 1973, Nina Mann, Trustee; Sigmund Lefkovitz Family Trust for the Family of Nina Joy, u/a/d July 31, 1973, Shelley Loyd, Trustee; Sigmund Lefkovitz Family Trust for the Family of Gayle Ruth, u/a/d July 31, 1973, Glenn Paul Lefkovitz, Trustee; Sigmund Lefkovitz Family Trust for the Family of Donna Jean, u/a/d July 31, 1973, Shelley Loyd, Trustee; Lefkovitz 1987 Family Trust, Glenn Lefkovitz, Gayle Dougherty and Donna Neshek, Trustees; Halsted #2 Trust, Sigmund Lefkovitz, Trustee; Halsted #3 Trust, Sigmund Lefkovitz, Trustee; Halsted #4 Trust, Sigmund Lefkovitz, Trustee; Halsted #5 Trust, Sigmund Lefkovitz, Trustee; Lefkovitz Numbered Family Trust #7, Sigmund Lefkovitz, Trustee; and Lefkovitz Numbered Family Trust #8, Sigmund Lefkovitz, Trustee.

Proposed Intervenor-Appellant: Jarnis United Properties Co.

RULE 29.6 STATEMENT

Petitioner has no parent corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jarnis United Properties Co. ("Jarnis") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 395 F.3d 773. The opinion of the district court (App., *infra*, 15a-27a) is reported at 291 F. Supp. 2d 764.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 10(a) of the Federal Arbitration Act, 9 U.S.C. § 10(a), states: "[T]he United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration * * * (4) where the arbitrators exceeded their powers."

Rule 24(a)(2) of the Federal Rules of Civil Procedure provides for intervention of right upon "timely application" where "the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

STATEMENT

The court below ratified an arbitration award imposing substantial financial obligations on petitioner despite the fact that no arbitral party sought relief against it. Petitioner was not a party to the arbitration, was never served with arbitral papers, and did not participate in the arbitration. Over four decades ago, the Second Circuit held in *Orion Shipping & Trading Co.* v. *Eastern States Petroleum Corp.*, 312 F.2d 299, 300 (2d Cir. 1963), that an arbitrator exceeds his powers by awarding relief against a nonparty to the arbitration. Until now, the federal courts have held true to that principle, which gives effect both to the consensual nature of arbitration and to the due process right to notice and an opportunity to be heard before one may be deprived of property. The Seventh Circuit's ruling in this case creates a circuit conflict over that issue.

That issue is one of national importance because the Seventh Circuit's ruling threatens to undermine the attractiveness of arbitration as an alternative means of resolving disputes. According to the Seventh Circuit, an arbitrator may award relief against a nonparty simply because the nonparty purportedly controls or is controlled by an arbitral party. If that is right, affiliates and other entities related to arbitral parties will be forced to intervene or otherwise join in arbitrations simply to protect against the risk that an award may be entered against them. Such a requirement would defeat the primary purpose of arbitration—to resolve disputes in less time, at less cost, and with less complexity than litigation.

Furthermore, the Seventh Circuit affirmed the district court's rejection of petitioner's right to intervene in the district court confirmation proceeding. That decision flouts Rule 24 of the Federal Rules of Civil Procedure and this Court's precedents, which recognize that a party has a

right to intervene if it has a significant interest that is not adequately represented by the existing parties. Petitioner plainly had an interest in whether an award imposing millions of dollars in obligations on it would be confirmed or vacated, and, as detailed below, that interest was not adequately represented by the existing parties. Accordingly, petitioner had a right to intervene in the district court proceeding to seek vacatur of the award against it.

Factual Background. In the late 1960s, six real estate investors began developing what became an elaborate structure of partnerships, corporations, and other entities in which they, their family members, trusts for the benefit of future generations, and outside investors held interests. As part of a restructuring of these holdings in 1990, petitioner Jarnis was established as a Florida general partnership with 39 general partners. R63-1, Exs. 1-7.

Disputes among the six principals developed over a variety of issues, leading to a lengthy arbitration under the Rules of the American Arbitration Association ("AAA"). Three proceedings involving different sets of claims were consolidated before the arbitrator. In the proceeding at issue here, the arbitral claimants were Sigmund Lefkovitz, Irving Lefkovitz, several of their family members, and several trusts, and the arbitral respondents were Nathan Wagner, Robert Goldman, Jay Felner, Albert Schwartzberg, and three businesses in which they held interests.

Jarnis was not a claimant or respondent in any of the arbitral proceedings, was not served with any arbitration papers, and did not participate in the arbitration. Many of the arbitral claimants and respondents were partners in Jarnis, but 24 Jarnis partners were not arbitral parties and did not participate in the arbitration. Neither the arbitral

claimants nor the arbitral respondents held a controlling interest in Jarnis. R86, Ex. J.

Despite the fact that Jarnis was not an arbitral party and that no party had requested relief against Jarnis, the arbitrator imposed severe financial obligations on Jarnis. His final award stated: "Jarnis is ordered to reimburse Claimants for approved legal fees and costs incurred in Proceeding 3, which total $1,857,186.20." App., *infra*, 32a. The arbitrator further ruled that Jarnis is "jointly and severally" liable for over $2.34 million in awarded damages (*id.* at 29a) and must pay for the preparation of audited financial statements both for Jarnis and for dozens of other nonparty entities for the years 1996 through 1999 (*id.* at 32a). Neither the arbitral claimants nor the arbitral respondents had requested imposition of any financial obligations on Jarnis.

Lower Court Proceedings. The arbitral claimants (now "plaintiffs") moved to confirm the award, and the arbitral respondents (now "defendants") moved to vacate it.[1] Jarnis petitioned to intervene so that it could seek to have the portions of the award directed to Jarnis vacated. Other non-party entities adversely affected by the award also petitioned to intervene. The district court denied all motions to intervene, stating that "[t]he various proposed intervenors are apparently controlled by the individual defendants in this case" and that the intervention motions were "untimely." App., *infra*, 16a n.1. The court did not explain how the defendants controlled Jarnis while holding only a minority voting interest, nor why moving to intervene shortly after the district court action had begun

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[1] The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331, based on a RICO claim in the initial complaint, and 28 U.S.C. § 1367(a).

and before the issuance of any substantive rulings was untimely.

The district court rejected the defendants' argument that the arbitrator exceeded his authority by awarding relief against a nonparty. First, the court ruled that the defendants lacked standing to "raise the rights of third parties." App., *infra*, 23a. The court further ruled that, in any event, the broad arbitration provision in the Jarnis General Partnership Agreement ("Jarnis Agreement") authorized the arbitrator's rulings. *Ibid.* The court did not explain how that provision could have authorized relief against an entity that was never named an arbitral party. The court also stated that Jarnis and the other nonparties "could have intervened in the underlying arbitration" because they "had notice of the ongoing arbitration and its potential ramifications." *Id.* at 23a & n.6. The court did not explain how Jarnis was on notice of any such ramifications where no arbitral party had sought relief against it. Finally, the district court upheld the arbitrator's order that *Jarnis* prepare and pay for audited financial reports on the ground that such an obligation could be "derived" from the plaintiffs' claims against the *defendants*. App., *infra*, 23a-24a.

The defendants and Jarnis filed separate appeals, which the Seventh Circuit consolidated. Jarnis argued that its petition to intervene should have been granted and that the arbitrator exceeded his authority by awarding relief against Jarnis, a nonparty to the arbitration. The Seventh Circuit affirmed, holding that Jarnis had no right to intervene in the district court proceeding.

The court of appeals recognized that Jarnis was not a party to the arbitration and that it was "certainly unusual—so unusual as to be unforeseeable"—for a nonparty "to be treated as Jarnis was, namely as a defendant (with respect

to the attorneys' fees)." App., *infra*, 6a. Thus, according to the court, it would "seem" that Jarnis was "entitled to intervene in the district court" to challenged such an "*ultra vires* act by an arbitrator." *Id.* at 6a-7a. Nevertheless, the court ruled that Jarnis was not entitled to intervene because "[t]he only plausible motivation for Jarnis's arguing against its being included in the award is that the defendants, who control Jarnis, are trying to derail the arbitration because they are dissatisfied with its outcome." *Id.* at 7a. The court based that conclusion on its view that "a judgment that Jarnis pay the plaintiffs $1.8 million has exactly the same consequence as a judgment that the defendants pay them $1.2 million (two-thirds of $1.8 million) because the defendants and their dependents own two-thirds of Jarnis." *Ibid.* The court concluded that, because Jarnis was not entitled to intervene, the issue of whether the arbitrator properly imposed financial liability on Jarnis was "moot." *Ibid.*

The court of appeals did not explain why it summarily deemed the absent adult individuals and trustees serving as Jarnis general partners "dependents" of the defendants, who collectively held only a one-third interest in Jarnis. More importantly, the court did not mention *Orion* or the other decisions presented to it which hold that an arbitrator has no authority to award relief against a nonparty even if he deems the nonparty to be a controlled or controlling affiliate of the arbitral party. Instead, and in conflict with *Orion* and its progeny, the Seventh Circuit allowed the arbitrator's award against Jarnis to stand.

REASONS FOR GRANTING THE PETITION

I. THE RULING BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON AN IMPORTANT FEDERAL QUESTION.

A. The Ruling Below Conflicts With The Decisions Of Other Courts Of Appeals.

Until the decision below, the courts of appeals had firmly held to the established principle that an arbitrator may not award relief against a nonparty to the arbitration. The leading case is *Orion Shipping & Trading Co.* v. *Eastern States Petroleum Corp.*, 312 F.2d 299, 300 (2d Cir. 1963).

In *Orion*, the plaintiff had contracted with defendant Eastern States to transport oil, an obligation guaranteed by Eastern States' parent corporation, Eastern American. The parties submitted their contract dispute to arbitration based on an agreement signed by Eastern States but not by Eastern American. *Ibid.* Although no claim was filed against Eastern American and it was not a party to the arbitration, the arbitrators found Eastern American liable on the guarantee. *Ibid.* The Second Circuit affirmed vacatur of the award because "the arbitrator exceeded his powers in determining the obligations of a corporation which was clearly not a party to the arbitration proceeding." *Ibid.* The court explained that the arbitrator effectively had pierced the veil separating the parent and subsidiary corporations and that it had no authority to do so where the parent corporation was not before it. "A decision whether parties other than those formally signatories to an arbitration clause may have their rights and obligations determined by an arbitrator when that issue

has not been submitted to him is not within the province of the arbitrator himself but only of the court." *Id.* at 301.

Prior to the ruling below, no federal court had contravened the *Orion* principle in a commercial arbitration case.[2] See *Nationwide Mut. Ins. Co.* v. *Home Ins. Co.*, 330 F.3d 843, 846 (6th Cir. 2003) ("An arbitration panel may not determine the rights or obligations of non-parties to the arbitration"); *Pacific Reinsurance Mgmt. Corp.* v. *Ohio Reinsurance Corp.*, 935 F.2d 1019, 1026 (9th Cir. 1991) (vacating confirmation of award against reinsurer which "first appeared as a named party" on the arbitration award itself); *IBEW Local 265* v. *O.K. Elec. Co.*, 793 F.2d 214, 216 (8th Cir. 1986) (arbitration award could not be enforced against corporate party's nonparty parent); *NCR Corp.* v. *Sac-Co., Inc.*, 43 F.3d 1076, 1080 (6th Cir. 1995) (vacating award because "arbitrators exceed their powers when they determine rights and obligations of individuals who are not parties to the arbitration proceedings"); *Schaad* v. *Susquehanna Capital Group*, 2004 WL 1794481, at *6 (S.D.N.Y. Aug. 10, 2004) (arbitrators "exceeded their powers in determining the obligations" of nonparties to the arbitration). State courts too have followed *Orion* and barred relief against nonparties. *E.g.*, *Brothers Bldg. Co.* v. *Yankow*, 779 N.E.2d 991, 995-996 (Mass. App. 2002) (vacating confirmation of arbitration award imposing liability on nonparty to arbitration) (citing *Orion*). Indeed, the principle that arbitrators have no authority to impose

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[2] Labor arbitration cases provide an exception to the *Orion* rule because a labor arbitrator must have the authority to bind union members who, strictly speaking, are not parties to the arbitration between the company and the union under a collective bargaining contract. See *Gvozdenovic* v. *United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991).

obligations on nonparties to the arbitration has become black-letter arbitration law. See Annotation, *Construction and Application of § 10(a)(4) of Federal Arbitration Act*, 136 A.L.R. Fed. 183, § 8[a] (1997); 1 DOMKE ON COMMERCIAL ARBITRATION § 39.6 (3d ed. 2003).

These authorities also recognize that the veil separating arbitral parties from their nonparty affiliates may not be pierced in a district court confirmation proceeding. As the Second Circuit put it in *Orion*, "an action for confirmation is not the proper time for a District Court to 'pierce the corporate veil.'" 312 F.2d at 301. The court explained that "[i]t would unduly complicate and protract the proceeding were the court to be confronted with a potentially voluminous record setting out details of the corporate relationship between a party bound by an arbitration award and its purported 'alter ego.'" *Ibid.* See also 4 I. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 38.1.7 (1999). Instead, a party seeking to impose liability on a nonparty must do so in "a separate action" against the nonparty, where it may raise any applicable veil-piercing theory. *Orion*, 312 F.2d at 301.

The Seventh Circuit's decision conflicts with the above authorities by affirming confirmation of an award imposing millions of dollars of financial obligations on Jarnis, a nonparty to the underlying arbitration. The Seventh Circuit's failure even to address *Orion* and its progeny after Jarnis had focused its argument on those decisions indicates that the Seventh Circuit was well aware that it was departing from the *Orion* principle. The Seventh Circuit should not be permitted to camouflage this circuit conflict simply by disregarding conflicting authority. Indeed, the Seventh Circuit previously has recognized "*Orion*'s rule that federal courts should confirm an arbitration award only against the parties to the

arbitration" but stated that it took no position "on *Orion*'s viability in this circuit." *Transportation Cybernetics, Inc.* v. *Forest Transit Comm'n*, 950 F.2d 350, 354 (7th Cir. 1992). The ruling below makes clear that the Seventh Circuit now has rejected the viability of *Orion* and its progeny.

B. The Circuit Conflict Concerns An Important Federal Question.

Permitting an arbitrator to award relief against a nonparty, simply because it is allegedly controlled by or affiliated with an arbitral party, would have stunning consequences. It would require entities affiliated with an arbitral party to join in the arbitration, whether or not any party was seeking relief against it. If an arbitrator could impose liability on General Electric in any arbitration in which NBC (General Electric's subsidiary) is a party simply because the arbitrator deems NBC to be controlled by General Electric, General Electric would be virtually compelled to intervene in the arbitration to protect itself—just what the district court said Jarnis should have done. App., *infra*, 23a-24a. The consequences for the arbitral process would be severe.

The inevitable flood of protective interventions would waste resources and greatly complicate arbitration proceedings, thereby undermining the widely heralded benefits of arbitration—"simplicity, informality, and expedition." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); see *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995). As Congress has recognized, arbitration helps avoid the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation." Y2K Act of 1999, Pub. L. No. 106-37 § 2(a)(3)(B)(iv), 113 Stat. 185, 186. Adding undue

complexity can only make arbitration less attractive as an alternative to litigation. The Court should review and reverse the decision below to prevent routine arbitrations from becoming multi-party quagmires.

II. THE COURT OF APPEALS ERRED BY AFFIRMING CONFIRMATION OF AN ARBITRATION AWARD AGAINST A NONPARTY TO THE ARBITRATION.

An arbitration award should be vacated where "the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). Here, as *Orion* and its progeny make clear, the arbitrator exceeded his powers by imposing obligations on Jarnis, a nonparty against which no party sought relief. See *supra* Part I.

In effect, the arbitrator pierced the veil separating the general partners named in plaintiffs' arbitration claims from the partnership. An arbitrator exceeds his powers by piercing the veil separating an arbitral party from nonparty affiliates. *Orion*, 312 F.2d at 300-301; *Data-Stream AS/RS Technologies, LLC* v. *China Int'l Marine Containers, Ltd.*, 2003 WL 22519456, at *3 (S.D.N.Y. Nov. 6, 2003). Unless those affiliates have been joined as arbitral parties, piercing the veil to reach independent entities is a judicial function and not "a proper subject of arbitration." *Carpenters 46 N. Cal. Counties Conf. Bd.* v. *Zcon Builders*, 96 F.3d 410, 414-415 (9th Cir. 1996); accord *ARW Exploration Corp.* v. *Aguirre*, 45 F.3d 1455, 1460-1461 (10th Cir. 1995); *Orion*, 312 F.2d at 301. That principle flows from the consensual basis of arbitration: An entity that did not agree to arbitrate never agreed to have an arbitrator decide whether it is subject to an arbitral award.

The arbitrator's lack of authority to impose obligations on nonparties is underscored by the terms of the arbitration provision in the Jarnis Agreement. It provides that an arbitration award "shall be final and binding on all *parties* thereto" and that "attorneys' fees incurred by all parties shall be paid and borne by the *parties*." CA App. 38 (emphasis added). Furthermore, AAA Commercial Arbitration Rule 43(c) authorizes the arbitrator to apportion "fees, expenses, and compensation" only among "the *parties*" (available at www.adr.org, emphasis added). These provisions gave the arbitrator no authority to order Jarnis, a *nonparty*, to pay plaintiffs' attorneys' fees and assume other obligations.

Jarnis and its nonparty general partners were not bound to arbitrate simply because the arbitral claimants and some of the arbitral respondents were general partners of Jarnis. See *Bellis* v. *United States*, 417 U.S. 85, 95 (1974) (partnership had "an established institutional identity independent of its individual partners"); cf. *Hottle* v. *BDO Seidman, LLP*, 846 A.2d 862, 875-876 (Conn. 2004) (upholding arbitration agreement designating partners as arbitrators in arbitration between former partner and partnership because the partner-arbitrators were not "equivalent to the partnership"). Under the governing Florida partnership law, "[a] partnership is an entity distinct from its partners" and has the capacity to be sued. Fla. Stat. Ann. §§ 620.8201(1) & comment; 620.8307; 620.8203-04. See *Anderson* v. *Potential Enters.*, 596 So.2d 488, 490-491 (Fla. App. 1992) (naming two of three general partners was insufficient to bind partnership). Accordingly, the claimants could not obtain relief against Jarnis without naming Jarnis as a party. See *Wagner* v. *Stratton Oakmont, Inc.*, 83 F.3d 1046, 1050 (9th Cir. 1996) (partner's execution of arbitration agreement did not "bind the partnership to arbitration"); 21 WILLISTON ON

CONTRACTS § 57:44 (4th ed. 2003) (at common law and under partnership statutes, "fewer than all of the partners do not have the authority to submit a partnership * * * liability to arbitration"); 68 C.J.S. *Partnership* § 163 (2003) ("A partner generally cannot bind the partnership to submit a firm controversy to arbitration").

Nor may a district court pierce the veil to reach a nonarbitral party in a proceeding to confirm or vacate the award. *Orion*, 312 F.2d at 301; *In re Promotora de Navegacion*, 131 F. Supp. 2d 412, 421 (S.D.N.Y. 2000). Any veil-piercing to reach a nonparty must take place either before arbitration, in a proceeding to compel or enjoin the arbitration, or in an independent enforcement proceeding. *Orion*, 312 F.2d at 301.

Precluding both the arbitrator and the reviewing court from piercing the veil between arbitral parties and nonparties is a sensible rule. Here, if the arbitral claimants had desired relief against Jarnis, they could have included Jarnis among the respondents when they filed their arbitration claims or have later amended their claims to add Jarnis. If plaintiffs had done so, Jarnis could have exercised one of several options: (i) submitted to arbitration; (ii) argued to the arbitrator that it was not bound to arbitrate and then sought to vacate an unfavorable decision (as the alleged alter egos did in *First Options* v. *Kaplan*, 514 U.S. 938 (1995)); or (iii) filed a court action to enjoin the arbitration claim against it. The arbitrator removed those options by awarding relief against Jarnis without its having been named a party. Similarly, if the plaintiffs had filed a "separate action" against Jarnis, as the *Orion* court suggested (312 F.2d at 301), Jarnis would have had an opportunity to defend itself in court. That opportunity was removed by employing the district court

confirmation action as an improper "substitute" for a proper veil-piercing inquiry. *Ibid.*

The district court confirmed the arbitration award against Jarnis on the ground that arbitral parties "apparently controlled" Jarnis (App., *infra*, 16a n.1), a decision the court of appeals should not have affirmed. The district court's reasoning was not only wrong legally but factually as well. The defendants did not control Jarnis. Their 36% interest in Jarnis (R86, Ex. J) was far less than the majority or supermajority vote required for major partnership decisions. R55-1, Ex. 5 § 8.01.

The "control" rationale of the courts below rested on their treating the dozens of trusts and individuals serving as Jarnis general partners as but pawns of the principals. But the law presumes that adult individuals and trustees are independent. Indeed, the trustees have a fiduciary duty to exercise independent judgment on behalf of the trust beneficiaries. See *Griffin* v. *Griffin*, 463 So.2d 569, 574 (Fla. App. 1985) (trustee must exercise "good faith" and be "judicious in his administration of the trust"); *Dick* v. *Peoples Mid-Ill. Corp.*, 609 N.E.2d 997, 1002 (Ill. App. 1993) (trustee must "act with the highest degree of fidelity and utmost good faith"). If Jarnis had been named a party, *all* interest-holders could have participated in Jarnis' decisionmaking, no matter what their voting strength. Their rights as general partners, and Jarnis' right to act in its own interests, were trampled by the decisions below.

After all, courts too may not impose obligations on nonparties that had no opportunity to defend themselves. "A court ordinarily does not have power to issue an order against a person who is not a party." 11A C. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2956, at 335 (2d ed. 1995). This principle reflects "our deep-rooted historic tradition that everyone should have his own day in

court." *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996). Thus, in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969), this Court held that a party's corporate parent was not bound by a judgment where it "was not named as a party, was never served and did not formally appear at the trial."

That principle applies with special force with respect to injunctive relief, such as the arbitrator's order that Jarnis submit to burdensome and costly audits. An injunction may not issue against "persons not parties to the suit [who] were not heard or represented" (*Scott* v. *Donald*, 165 U.S. 107, 117 (1897)), and a court may not enjoin "the conduct of persons who act independently and whose rights have not been adjudged according to law" (*Chase Nat'l Bank* v. *City of Norwalk*, 291 U.S. 431, 437 (1934) (Brandeis, J.)). See also *Alemite Mfg. Corp.* v. *Staff*, 42 F.2d 832, 832 (2d Cir. 1930) (Hand, J.) ("no court can make a decree which will bind anyone but a party"). Because the full impact of the ordered audits will fall on Jarnis, the award should have been vacated where Jarnis was given no opportunity to be "heard or represented."

At bottom, these precedents rest on due process, which requires notice and an opportunity to be heard before one may be deprived of one's property. *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 14-15 (1978); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Hence, "one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940). Because Jarnis was not given any notice that its financial resources were in jeopardy, fundamental fairness requires that the award against it be vacated.

III. THE COURT OF APPEALS ERRED BY REJECTING JARNIS' RIGHT TO INTERVENE IN THE DISTRICT COURT PROCEEDING TO CHALLENGE THE AWARD AGAINST IT.

Although the arbitrator imposed millions of dollars in obligations on Jarnis, the district court rejected its petition to intervene in the district court proceeding, and the court of appeals affirmed. The rulings below conflict with the plain terms of Fed. R. Civ. P. 24(a)(2), which provides for a right to intervene if a timely petition claims "a sufficient interest in the proceedings [which] is not adequately represented by existing parties." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 (1972).[3]

Jarnis' petition to intervene was timely. Following the arbitration, the case was reinstated in the district court on March 21, 2003. R38. Jarnis retained its own counsel in April to evaluate its options. After unsuccessfully challenging the district court's jurisdiction, the defendants filed their motion to vacate the award on June 10. R48. The plaintiffs' August 22 response argued that the defendants lacked standing to challenge the arbitrator's imposition of obligations on Jarnis and other nonparties. R69 at 37. Jarnis petitioned to intervene twelve days later on September 3. R76. Thus, Jarnis filed its motion just 5½ months after the case was reinstated, before the district court had issued a single substantive ruling, and just twelve days after it learned that it had to intervene to

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[3] Jarnis has standing to seek this Court's review of the intervention ruling below. "One who has been denied the right to intervene in a case in a court of appeals may petition for certiorari to review that ruling." *Izumi* v. *U.S. Philips Corp.*, 510 U.S. 27, 30 (1993); accord *United Automobile Workers* v. *Scofield*, 382 U.S. 205, 209 (1965).

protect its interests. See *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 394 (1977) (intervention was timely where respondent "promptly moved to intervene" after learning that she "would no longer be protected" by the existing parties"); *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 552-553 (1974) (intervention was timely where purported class members moved to intervene shortly after class certification was denied). As the district court recognized in a subsequent order in this case, the short delay "between the plaintiffs' filing and that of the proposed intervenors does not seem unreasonable" and "in no way prejudiced the plaintiffs." *Lefkovitz* v. *Wagner*, 219 F.R.D. 592, 593 (N.D. Ill. 2004).

The district court nevertheless deemed Jarnis' petition untimely apparently because Jarnis "could have intervened in the underlying arbitration." App., *infra*, 23a. But even if Jarnis could have intervened in the arbitration (which would have required the consent of the existing parties), it was not obliged to do so. "The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Chase Nat'l Bank*, 291 U.S. at 441. Nor did Jarnis have any reason to intervene in an arbitration in which no party had sought relief against it. The arbitrator first indicated he would enter an award against Jarnis after the evidentiary hearing was completed and the evidentiary record closed. R63-5, Ex. 45, at 13. Intervention at that point would have forced Jarnis to submit to an adverse award by an arbitrator that it had played no part in selecting. Participating in the selection of an arbitrator is a critical and substantive right that Jarnis was not obliged to forgo.

Jarnis plainly had an interest in the district court confirmation action, having been ordered to pay millions

of dollars by the arbitrator. No party adequately represented Jarnis' interest. See *Georgia* v. *Ashcroft*, 539 U.S. 461, 477 (2003) (upholding right to intervene of persons whose interests were "not adequately represented by the existing parties"); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 135-136 (1967) (company had right to intervene because it had "an interest" in the "transaction which is the subject of the action" and the "existing parties have fallen far short of representing its interests"). Inadequate representation is shown when existing parties "may be" inadequate, a requirement that this Court has described as "minimal." *Trbovich*, 404 U.S. at 538 n.10; see also *Kaufman* v. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A.*, 343 U.S. 156, 161-162 (1952) (parties had right to intervene because their "interests may be inadequately represented"). In the district court, the plaintiffs obviously could not adequately represent Jarnis because they were trying to confirm the award against Jarnis. Nor could the defendants adequately represent Jarnis because the district court ruled that they lacked standing to "raise the rights of third parties," including Jarnis. App., *infra*, 23a. Moreover, the interests of the defendants and Jarnis were in conflict because the defendants benefited by the arbitrator's imposition of financial obligations on Jarnis rather than on the defendants. Four of the defendants were not Jarnis general partners and thus were not affected by the award against Jarnis. The other four defendants were affected only to the extent of their percentage ownership in Jarnis.

The Seventh Circuit ruled that the defendants' purported "control" of Jarnis made them adequate representatives of Jarnis' interest. App., *infra*, 7a. But as explained above, the defendants, far from controlling Jarnis, collectively possessed only 36% of the voting units.

R86, Ex. J. The court of appeals relied in part on supposed admissions by the defendants (App., *infra*, 5a), referring to court papers filed in support of a motion to compel arbitration in which the defendants accepted, only for purposes of that motion, the truth of control allegations in the plaintiffs' complaint. R4 at 2 & n.1. But even if the *defendants* had made any such admission, that would not bind *Jarnis*, an independent entity with the capacity to represent its own interests in legal proceedings. See Fla. Stat. Ann. §§ 620.8201 cmt.; 620.8307; 620.8203-04; *Zenith Radio*, 395 U.S. at 110 (parties' stipulation did not bind party's nonparty corporate parent).

In short, Jarnis had a right to intervene to contest the arbitrator's award, which imposed millions of dollars in financial obligations on Jarnis in an arbitration in which it was not a party and no party had sought relief against it. This Court should grant the petition and reverse the decision below both to ensure that arbitration awards are not imposed on nonparties and to preserve the fundamental right to a day in court to defend one's interests.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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